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**Beverly Enterprises, Inc. and its subsidiary Beverly Health and Rehabilitation Services, Inc., and its subsidiary Beverly Enterprises-Florida, Inc., d/b/a Beverly Health and Rehab Center-Paradise Pines and d/b/a Suwanee Healthcare, and individual facilities and each of them; and Beverly Enterprises, Inc. and its subsidiary Spectra Healthcare Alliance, Inc., and its subsidiary Beverly Rehabilitation, Inc., and individual facilities and each of them and United Food and Commercial Workers International Union, Local 1625, AFL-CIO.**

**Beverly Enterprises, Inc. and its subsidiary Beverly Health and Rehabilitation Services, Inc., d/b/a Elizabeth Adam Crump Manor and d/b/a Northwest Healthcare Center, and Beverly Enterprises, Inc. and its subsidiary Spectra Healthcare Alliance, Inc., and its subsidiary Beverly Rehabilitation, Inc., and individual facilities and each of them and United Food and Commercial Workers International Union, Local 400, AFL-CIO.** Cases 6-CA-31111 and 6-CA-31707

February 27, 2004

#### DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND WALSH

On February 11, 2003, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, an answering brief, and a reply brief. The General Counsel filed limited exceptions and a supporting brief, and a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.

1. In adopting the judge's findings that the Respondent violated Section 8(a)(5) by refusing to recognize the Un-

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

ions as collective-bargaining representatives for the rehabilitation employees, we note that the Respondent's cited cases, *Hill-Rom Co. v. NLRB*, 957 F.2d 454 (7th Cir. 1992), *University of Chicago v. NLRB*, 514 F.2d 942 (7th Cir. 1975), and *Facet Enterprises v. NLRB*, 907 F.2d 963, 975 (10th Cir. 1990), are not inconsistent with Board law. In those cases, the courts examined whether an employer's transfer of work to nonunit employees constituted a nonmandatory subject of bargaining that the employer could lawfully implement so long as such a transfer was not motivated by antiunion animus and the employer bargained over the effects of the transfer. Here, however, as found by the judge, the Respondent did not transfer work to nonunit employees. The same employees continue to do the work. The Respondent attempted to change the scope of the bargaining unit by taking the position that these represented employees and their work were now outside the bargaining unit. Accordingly, we agree that *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982), enfd. 721 F.2d 187 (7th Cir. 1983), involving a similar change in unit scope, is controlling.<sup>2</sup>

2. We do not adopt the judge's statement in the remedy section of his decision that the issue of whether the Respondent's unfair labor practices may have caused some employees to quit their positions as rehabilitation aides is appropriate for resolution in the compliance stage of this proceeding. The General Counsel has not alleged or shown that any employees have been constructively discharged as a result of the Respondent's violations; accordingly, such an issue is not appropriately reserved to the compliance stage. We will modify the recommended Order to reflect this change, and we will substitute a new notice accordingly.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Beverly Enterprises, Inc., Fort Smith, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2 (e).

<sup>2</sup> In addition, we agree with the judge that the duties and working conditions of the rehabilitation aides did not change to such a degree as to render the bargaining units, with the aides included, inappropriate. However, we do not rely on the judge's finding that the Respondent failed to rebut the presumptive appropriateness of single-facility units. There is no general, freestanding presumption that single-facility units are appropriate. A *petitioned-for* single-facility unit is presumptively appropriate, see, e.g., *Trane*, 339 NLRB No. 106, slip op. at 2 (2003)—but then, so too is a *petitioned-for* employerwide unit, see, e.g., *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998). Since no representation petition is before us here, however, we need not rely on any presumption.

“(e) Make employees whole for any loss of earnings and other benefits suffered as a result of the unfair labor practices, in the manner set forth in the remedy section of the judge’s decision as amended herein.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. February 27, 2004

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize the United Food and Commercial Workers International Union, Local 1625, AFL-CIO as the collective-bargaining representative for rehabilitation aides as part of the established collective-bargaining units at the Paradise Pines and Suwannee facilities and refuse to apply the collective-bargaining agreements to rehabilitation aides.

WE WILL NOT refuse to recognize the United Food and Commercial Workers International Union, Local 400, AFL-CIO as the collective bargaining representative for rehabilitation aides as part of the established collective-bargaining units at the Northwest and Crump Manor facilities and refuse to apply the collective-bargaining agreements to rehabilitation aides.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL recognize and bargain with the United Food and Commercial Workers International Union, Local 1625, AFL-CIO as the exclusive representative of the rehabilitation aides employed at the Paradise Pines facility as part of the following appropriate unit concerning terms and conditions of employment:

All full-time and regular part-time non-professional associates in the bargaining unit located at Paradise Pines, 11565 Harts Road, Jacksonville, Florida 32218 (certified by the National Labor Relations Board, Case 12-RC-6408); said bargaining unit including all full-time and regular part-time service and maintenance associates, including cooks, dietary aides, nursing assistants, physical therapy assistants, janitors, laundry aides and housekeeping aides; excluding administrator, director of nursing, nursing supervisor, charge nurses, all registered nurses, all licensed practical nurses, activities director, social service director, maintenance supervisor, staff development coordinator, bookkeepers, administrative secretary/personnel specialist, all office clerical associates, medical records secretary, licensed physical therapy assistants, professional associates, technical supervisors as defined in the Act.

WE WILL recognize and bargain with the United Food and Commercial Workers International Union, Local 1625, AFL-CIO as the exclusive representative of the rehabilitation aides employed at the Suwannee facility as part of the following appropriate unit concerning terms and conditions of employment:

All full-time and part-time non-professional associates in the bargaining unit located at Suwannee Health Care Center, 1620 Helvenston Street SE, Live Oak, Florida 32060 (certified by the National Labor Relations Board, Case 12-RC-6760); said bargaining unit including all full-time and regular part-time service and maintenance associates, including cooks, dietary aides, nursing assistants, physical therapy assistants, janitors, laundry aides and housekeeping aides; excluding administrator, director, maintenance supervisor, staff development coordinator, bookkeepers, administrative secretary/personnel specialist, all office clerical associates, medical records secretary, licensed physical therapy assistants, professional associates, technical supervisors as defined in the Act.

WE WILL recognize and bargain with the United Food and Commercial Workers International Union, Local 400, AFL-CIO as the exclusive representative of the rehabilitation aides employed at the Northwest facility as

part of the following appropriate unit concerning terms and conditions of employment:

Included all full-time and regular part-time service and maintenance employees employed by the Employer at 3333 Wisconsin Avenue, N.W., Washington, DC including nurses' assistants, ward clerks, activities employees, dietary and kitchen employees, maintenance employees, housekeeping and laundry employees, and painters, excluding registered nurses, licensed practical nurses, office clericals, professionals, technical employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL recognize and bargain with the United Food and Commercial Workers International Union, Local 400, AFL-CIO as the exclusive representative of the rehabilitation aides employed at the Crump Manor facility as part of the following appropriate unit concerning terms and conditions of employment:

All regularly scheduled non-professional employees in the bargaining unit certified by the National Labor Relations Board in Case 5-RC-12097; said bargaining unit including all full time and regular part-time service and maintenance employees, including nursing assistants, physical therapy aides, food service employees, including cooks, housekeeping employees, maintenance employees, activities assistant, beauty shop operator, and laundry employees at the Employer's facility located in Glen Allen, Virginia; said bargaining unit excluding office clerical employees, administrative secretary, medical records clerk/nursing secretary, administrator, director of nursing, registered nurses, licensed practical nurses, executive housekeeper, floor supervisor, foods service director, bookkeeper, activities director, dietary supervisors, physical therapist, maintenance engineer, social services director, social worker, education coordinator, director of volunteer services, confidential employees, temporary and casual employees, guards and supervisors as defined in the Act.

WE WILL make our employees whole, with interest, for any loss of earnings and other benefits suffered as a result of our unfair labor practices.

BEVERLY ENTERPRISES, INC.

*JoAnn F. Dempler, Esq.*, for the General Counsel.

*Keith R. Jewell, Esq.*, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on March 11-14 and April 11, 2002, in Jacksonville, Florida, on October 9, 2002, and in Washington, D.C. on October 28, 2002. The charges

were filed on February 5 and March 9, 1999, respectively by United Food and Commercial Workers International Union, Local 1625, AFL-CIO and United Food and Commercial Workers International Union, Local 400, AFL-CIO, respectively (the Unions). The consolidated amended complaint (the complaint) was issued July 10, 2001. The complaint, as finally amended at the hearing, alleges that the entities set forth in the caption (Respondent) constitute a single, integrated enterprise and a single employer. It also alleges that Respondent violated Section 8(a)(5) and (1) by transferring certain unit employees from one part of Respondent to another, that Respondent excluded those employees from the existing collective-bargaining unit, failed to recognize those employees as part of the unit, and failed to apply the contractual provisions to them. The complaint alleges that by such conduct Respondent change the scope of the bargaining units and did so without the consent of the Unions. In the alternative the complaint alleges that Respondent violated the Act by making the transfers without affording the Unions an opportunity to bargain about the transfers. Finally, the complaint seeks special remedial relief against Respondent because of its past history of violating the Act.

Respondent filed a timely answer that admitted the filing and service of the charges on certain entities, jurisdiction, labor organization status, appropriate unit, and 9(a) status. The answer denied that Respondent was a single employer and it denied the substantive allegations of the complaint. Finally, Respondent pled as affirmative defenses that the contracts allowed it to abolish the classifications, that the matter should be deferred to the grievance-arbitration process, that it was not required to bargain since the transfers represented a basic change and redirection of its business, that the charge in Case 6-CA-31707 was not timely served on all the parties, and there were "fatal variances between the charges and the complaints."

On May 8, 2000, the Board denied Respondent's Motion for Summary Judgment and deferral of the complaint on the ground that it raised genuine issues of material fact that would be better resolved after the hearing. Because this case turns on the resolution of unit placement issues I conclude that deferral to the grievance-arbitration process is not warranted. On October 10, 2001, I denied Respondent's motion to sever and approve settlement agreement. I did so because the proposed settlement did not adequately remedy the allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, composed of several corporations, provides medical, professional, and therapy healthcare services at facilities located in several States and the District of Columbia. Respondent has a general corporate office in Fort Smith, Arkansas. Respondent annually receives gross revenues in excess of \$500,000 and purchases and receives products, goods and materials valued in excess of \$5000 directly from States outside

the State in which the facility is located. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### *Single-Employer Issue*

#### 1. Background

First, I identify the parties. Beverly Enterprises, Inc. (BEI) is at the top of Respondent's organizational scheme. It wholly owns six subsidiaries. The General Counsel sought a remedy against the six entities, but on January 17, 2002, I dismissed the allegation concerning four of the subsidiaries.<sup>1</sup> One of the two remaining subsidiaries, Beverly Health and Rehabilitation Services Inc. (BHR) was doing business at the relevant times as Beverly Healthcare. BHR, in turn, has a number of subsidiaries. The parties stipulated that BHR and its wholly owned subsidiaries constitute a single employer within the meaning of the Act. This stipulation is consistent with the Board's conclusions in *Beverly California Corp.*, 326 NLRB 232 (1998), *enfd.* 227 F.3d 817 (7th Cir. 2000), and *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001). The remaining wholly owned subsidiary of BEI is Spectra Healthcare Alliance, Inc. (Spectra). Spectra wholly owns three subsidiaries. They are Beverly Rehabilitation, Inc. doing business at the relevant times as Aegis Therapies (Bev Rehab); Homecare Preferred Choice, Inc. (Homecare), and Matrix Rehabilitation, Inc. (Matrix).

#### 2. BEI

BEI operates as a holding company for its subsidiaries and it also provides them with certain services for which it is paid by the subsidiaries. BEI's cost of providing these services is included in a management fee paid by the subsidiary to BEI. BEI's website in August 2001 indicated that BEI and its subsidiaries were the leading providers of eldercare services in the United States. It employed some 60,000 employees in more than 600 locations, including 528 skilled nursing facilities, 34 assisted living centers, 58 homecare and hospice agencies, and 163 outpatient therapy clinics. Through Bev Rehab it also offered rehabilitative services on a contract basis to nursing homes operated by BHR and other care providers. The website indicates that BEI is organized into four business lines. BHR is held out as the nation's largest nursing home company with more than 530 skilled nursing centers and assisted living facili-

ties; Bev Rehab is identified as a leading rehabilitation company. According to that website home care provides hospice care, home-health services, infusion therapy, and home medical equipment at some 60 locations and Matrix provides occupational rehabilitation and case-management services at more than 160 outpatient therapy clinics. BEI's 1998 annual report asserts that it "operated" the facilities described above. BEI's 1999 annual report again included its subsidiaries BHR and Spectra. That annual report indicated that all these entities had a common mission, values, and vision. It included a letter from BEI's chairman of the board and chief executive officer, David Banks, that was addressed to the shareholders and employees of BEI as well as of BHR and Spectra. That letter described the turbulent nature of the industry in 1999, BEI's disappointing financial results, some encouraging operating highlights, some promising opportunities ahead, and outlined aggressive actions to improve results. Banks also spoke to various professional organizations where he spoke on behalf of all the BEI's health-care providing subsidiaries. He discussed initiatives that had been undertaken including topics such as criminal background checks on employees and a report card system.

As indicated, Banks was BEI's chairman of the board and chief executive officer. During the relevant time period, Boyd Hendrickson was president and chief operating officer of BEI and Skyler Hollingsworth was senior vice president and treasurer. BEI's executive vice president and chief financial officer was Scott Tabakin. Senior officers of BEI constituted four of the five members on the boards of directors of BHR, Bev Rehab, Homecare, and Matrix; the fifth member of the boards of directors was the individual subsidiary president.

Management officials transferred between BEI and its subsidiaries. For example, Elizabeth Shelton began working for Spectra in 1994 as national director of recruitment. On January 1, 1999, she became vice president of human resources and employment for Bev Rehab. In June 2000, she moved to BEI where she oversaw recruitment for the entire organization.

About two or three times a year BEI's Hendrickson chaired meetings of senior management from BEI and its subsidiaries. These meetings generally lasted 2 days and covered matters such as the review of the operations of each subsidiary, the development of business opportunities, and the identification of opportunities for the subsidiaries to work together to achieve cost savings.

BEI developed a code of conduct and business ethics. This applied to all the employees of BEI and the employees of its subsidiaries. Likewise, BEI has a drug testing and background investigation guidebook. This too applied to all employees of BEI and its subsidiaries.

BEI had a labor and employment department that served as a resource for advice on personnel matters. It was involved in negotiating collective-bargaining agreements for about 100 bargaining units. It also handled grievances and arbitrations arising from those contracts. That department was also involved in the investigation of charges filed by employees with agencies such as the EEOC and NLRB and responding to election petitions and union organizing campaigns. Hendrickson of BEI had a policy of having the administrator of a nursing home that underwent an organizing effort write a report about the

<sup>1</sup> Beverly Enterprises International Limited holds investments in joint ventures in Japan and Chile. Beverly Funding Company is a bankruptcy remote subsidiary which issues debt instruments to third parties secured by patient accounts receivables purchased from BHR. Beverly Indemnity, Ltd. is a captive insurance company that reimburses liability coverage for BEI and its subsidiaries. Finally, TMD Disposition Company is a holding company; it holds registered and unregistered stock in a public company. None of the entities employs any employees. There is no contention that these companies are needed to effectuate the order in this case or in any other prior case. Although the General Counsel in his brief asks that I reconsider this ruling, he makes no new arguments. I therefore deny the request to reconsider.

experience and why the employees were dissatisfied and felt the need to seek union representation. Donald Dotson, who during the relevant time served as senior vice president of BEI's labor and employment department, also served in that capacity for BHR, Bev Rehab, Homecare, and Matrix.

BEI's labor and employment department undertook an effort to create one policies and procedures manual. The objective was to create a manual that was current and would be applicable to BEI and all of its subsidiaries and that also allowed regions that for historical reasons had developed unique differences in benefits to customize the manual for their own purposes. The manual that was created applied to BEI and BHR. In fact, the policies and procedures manuals for BHR, Bev Rehab, Homecare, and Matrix each identified BEI forms to be used and were otherwise substantially similar. BEI's labor and employment department also oversaw the creation of an employee handbook. The employee handbooks of BHR, Bev Rehab, Homecare, and Spectra were also substantially similar.

Each year BEI developed a performance plan. BEI developed the portion of the plan pertaining to it. Spectra, BHR, Homecare, and Matrix also developed those portions pertaining to them. Those portions of the plan were submitted to BEI's chief operating officer for approval.

BEI established a policy to monitor the approval of major expenditures made by BEI and its subsidiaries. That policy required that all repairs, maintenance, renovations, and equipment purchases of \$500 or more be approved in writing. Purchases of over \$500,000 had to be approved by BEI's executive vice president of asset management as well as BEI's chief financial officer. Purchases of over \$750,000 had to be approved by BEI's capital allocation committee. Serving on that committee were representatives of some of the subsidiaries. The purpose of the capital allocation committee was to make sure that BEI and its subsidiaries allocated their cash correctly because there were cross-collateralized loans and the Company as a whole had some common treasury functions. That allocation committee reviewed major expenditures to assure that there would be the necessary cash flow generated for the Company as a whole. While the cash generated by the various subsidiaries was separately compartmentalized so that each subsidiary could determine its profit and loss, the cash ultimately was aggregated into a BEI account. BEI also conducted financial audits of facilities operated by the subsidiaries. When events occur in the subsidiaries that warranted the issuance of a press release, BEI's communications department issued the release. That same department created several newsletters, one of which was available to the employees of BEI and all the subsidiaries and others which were available to more targeted portions of the employees of the subsidiaries.

BEI operated the Beverly Enterprises Automated Clearing House (BEACH). Under this program BEI's purchasing department was responsible for contracting with vendors to supply goods and services to the operations of its subsidiaries. These goods included items such as medical supplies, linens, housekeeping supplies, and business office supplies. The subsidiaries were expected to use the BEACH program and purchase the supplies from the approved vendors, but each subsidiary ultimately decided for itself the extent to which it used

the BEACH program. The individual facilities that ordered the supplies were sent invoices through BEI's accounts payable department. BEI's information technology department negotiated volume discounts with major equipment vendors such as IBM, Dell, and Xerox and was able to share the discounts with its subsidiaries when the subsidiaries purchased the equipment. By the same token BEI was able to offer its subsidiaries volume-driven financing rates when they purchased equipment. BEI also offered "lease versus buy" analyses so that the subsidiaries were able to determine the best and most efficient use of their money. The purchasing functions performed by BEI also allowed for negotiation and documentation expertise, market analysis, equipment uniformity for interactive use, technical support, spare part servicing, etc. It also provided efficient and effective equipment tracking that in turn allowed the subsidiaries to more readily share and transfer equipment. The cost of the equipment was borne by the purchasing business unit within the subsidiary as an operating expense each month. An obvious consequence of this uniform policy was that individual facilities were generally not able to go to local suppliers and purchase different equipment.

BEI had an incentive compensation program for rewarding its senior management team with money beyond base pay. That same incentive compensation plan applied to the senior management officials of Spectra and BHR. BEI's board of directors approved executive level payouts of incentives.

BEI offered its subsidiaries a travel center to make travel plans. More significantly, BEI developed a travel policy that explained in detail the circumstances under which travel must occur. The policy covered matters such as selection of airplane flights, car rental, and the use of personal cars, credit cards, expense reports, reimbursement, and other matters. That policy applied to all BEI's subsidiaries. BEI also had a fleet of vehicles available for use by its employees. It developed a vehicle use policy that described who was eligible to use the vehicles and also described in detail the circumstances under which the vehicle may be used. This policy too applied to all the subsidiaries.

BEI communicated with users of the services provided by its subsidiaries and their friends and family to determine the satisfaction level of the services. BEI tabulated this information and used it for several purposes, including marketing.

Although each subsidiary is free to select the pay rates and benefits that it will provide to its employees, in fact the pay rates and benefits offered to employees by BHR, Bev Rehab, Homecare, and Matrix were substantially similar. BEI provided payroll services to the subsidiaries. Information was entered into computers at the local facilities and then processed by BEI. BEI then transmitted the employee paychecks with the full variety of deductions; BEI also produced the W-2 forms for the employees. BEI created a bookkeeper's training guide that instructed the local employees on how to input data into BEI's computer system.

BEI developed and conducted training sessions that included employees from BHR, Bev Rehab, Matrix, and Homecare. For example, in 1998 BEI put together "The Heat Is On, Beverly Leadership Training" for the leading managers of all the subsidiaries. That program, tailored by Franklin Covey, was de-

veloped in anticipation of legislatively mandated changes in the Medicare system. It was designed to introduce BEI's strategy and invest new resources by training some 6000 key managers, including executive managers and department heads at the individual facility level. Top executives from BEI participated in the presentation of the program. BEI also conducted training on subjects such as grievance handling and how to present an arbitration case. Those topics were primarily directed to BHR managers, but the training was available to personnel of all BEI subsidiaries as well. The BEI subsidiaries freely shared information and "best practices" with each other.

Construction of new facilities was handled by BEI's construction department. BEI's corporate legal department handled the licensing required to operate the assisted living facilities.

### 3. BHR

BHR is the largest BEI subsidiary. It operated nursing homes and assisted living centers located throughout the United States. William Mathies was president of BHR during the relevant time period. He reported to BHR's board of directors and to BHR's sole shareholder BEI. His day-to-day contact in this regard was with BEI Chief Operating Officer and President Boyd Hendrickson; they had regular meetings where they discussed BHR's operations. Mathies later became an executive vice president for BEI. Some employees of BHR reported to persons employed by entities other than BHR. For example, a BHR sales and marketing employee ultimately reported to Mark Mostow of BEI. J. West, a division vice president in rehabilitation for BHR, reported to Cindy Susinka, president of Bev Rehab. Another position reported up the line to Spectra. As described below in more detail, BEI serves two main functions in relation to BHR. It provided oversight and direction by virtue of the fact that it is the sole shareholder of BHR's stock and it provided a variety of services to BHR. BHR paid BEI a service fee for those services and that fee was based on the cost to BEI. In other words, BEI did not make a profit for providing those services.

BHR developed its own annual budget. This budget was reviewed by BEI's chief operating officer and then was approved by BEI's board of directors as part of BEI's overall budget.

From time to time BHR divested itself of certain nursing homes. Those decisions needed the approval of BEI's chief operating officer and its board of directors. All the paperwork involved in the divestiture was handled by persons in various departments of BEI. Acquisitions were handled in a similar fashion. One of BHR's employees proposed building an assisted living center on the grounds of a skilled nursing home. He gathered information and traveled to Fort Smith where he presented the proposal to both Mathies of BHR and Banks of BEI.

BHR determined what products it needed to purchase, and then BEI's purchasing department executed the purchases through the BEACH program. BHR determined when it needed the services of outside vendors such as podiatry. It used a standardized contract developed by BEI's legal department to engage such services. BEI prepared BHR's income and prop-

erty tax returns. If it became necessary to use outside tax consultants, BEI hired them.

All of BHR's insurance, including general liability, fire, oil, and machinery was obtained through BEI's risk management department. That department determined the insurance carrier and the amount of insurance coverage. That same department processed all of BHR's workers' compensation claims and monitored trends in the workers' compensation field with the goal of reducing those claims. It also provided consultative services to BHR in that area by suggesting how potential problems could be handled differently. BEI's risk management department also handled claims made against BHR for matters such as improper resident care and automobile and property damage.

While individual facilities were responsible for complying with OSHA requirements, BEI's safety and loss department provided the facilities with services necessary to achieve compliance.

Information such as clinical records of patients was entered at the local level and transmitted to BEI's mainframe computer in Fort Smith. BHR was then able to access the information there. Billing for patient services covered Medicare was handled through BEI's Medicare department. Private pay patient payments and Medicaid payments were billed on a more local level.

BHR selected the benefits that it offered to its employees. However, negotiations with contractors to obtain standard benefits were handled by BEI. BEI also assisted BHR in developing the kinds of benefits that BHR wanted for its employees. Those benefits were administered by BEI's benefits administration department. That department also was ultimately responsible for the preparation of a benefits administration manual. BEI also conducted wage surveys for BHR so that BHR could determine appropriate wage levels for its employees. BHR used an automated time records system that interfaced with BEI's payroll system.

BEI's legal and labor and employment departments worked together to develop a program to assure that charge nurses had a proper understanding of their role as supervisors. This program was implemented for BHR.

BHR required its employees to comply with BEI's code of conduct and ethics policy. In that regard, employees were directed to refrain from engaging in an activity if they were in doubt concerning whether the activity was proper. Instead, the employees were directed to seek advice from their superiors including, ultimately, BEI's corporate compliance officer or legal department. BHR also required its employees to comply with ethical and legal standards related to resident abuse and neglect. In this regard employees were to report potential legal or ethical violations to management or to BEI's hotline. This hotline number was available at all of BHR's nursing homes and assisted living facilities. BEI's quality management department logged the hotline complaint, referred it to a local consultant or other person for investigation, preparation of a report, and if necessary counseling and education at the local facility or talking to higher management concerning the incident. If necessary, the facility that was subject to the complaint developed an action plan to deal with the problem. The report

and action plan were then sent to BEI's hotline management to close out the case or to BHR's group vice president for followup.

BHR operated under BEI's quality management program. That program measured certain quality indicators such as the number of falls, incontinence, etc. The results were reviewed with BEI officials as part of BEI's quarterly board of directors meetings. A member of BEI's quality management department also participated as part of a team in conducting the quality review.

Changes in BHR's paydays or pay periods had to be approved by BEI's legal department. That same department had to approve the designation of certain positions as being exempt under the provisions of the Fair Labor Standards Act. It also oversaw the processing of garnishment of employees' wages.

BEI advised BHR that it was required to have an affirmative action plan because BEI was a Federal contractor. BEI's department of labor and employment was responsible for overseeing that affirmative action plan.

BEI conducted training for BHR's human resources managers on topics such as "benefits survey results," "internal audits 1-9s," "safety incentive program/lifts," "code of conduct/business ethics," and "new developments in government audits." BHR's human resources staff also attended a "Pro-Active Union Management Seminar" at which many of the speakers were from BEI. BEI produced a booklet "Pro-Active Union Management" that was distributed to human relations staff at BHR. The information contained in the booklet was conveyed to management at the individual facilities. BHR also conducted a series of roundtable discussions among some of its executive directors. Hendrickson and others from BEI attended so that they could hear first hand what the problems were.

Sometime in the late 1980s therapy services at BHR's nursing homes were provided by outside contractors. Thereafter BEI decided that BHR should start providing therapy services directly from its own staff and BHR began the gradual process of hiring its own therapy employees such as speech, occupational, and physical therapists. It also began to hire support staff such as rehabilitation assistants and aides. Spectra provided the recruiting services for BHR and BHR paid Spectra for those services.

At some point prior to 1998 the United States Government changed the manner in which it paid for services provided to Medicare beneficiaries. Prior to the change service providers were reimbursed on a cost plus basis. However, after the change service providers were paid a fixed rate of reimbursement. BHR determined that it would lose a significant amount of money if it continued to provide rehabilitation services in the manner that it had. Mathies and Mark Worthley, president of Spectra, worked together with input from BEI to develop a strategy to deal with the problem. They ultimately decided to create Bev Rehab and have Bev Rehab provide rehabilitation services to BHR. They made this decision in consultation with, and with the approval of, BEI. On February 5, 1998, BHR and Spectra jointly advised the rehabilitation therapists, assistants, and aides that BHR would no longer be providing rehabilitation services but instead Bev Rehab would begin providing those services to BHR. The notice assured those employees who

would be retained that they would remain Beverly employees but that there could be an impact on the benefits levels provided to them. It also stated that Bev Rehab "will remain an integral part of each facility."

As more fully described below, Bev Rehab became operational January 1, 1999. It came into existence as a result of an earlier transfer of certain BHR stock to BEI. BEI, in turn, transferred that stock to Spectra. Bev Rehab was established to provide therapy services to BHR at its skilled nursing homes on a more cost effective basis. BHR and Bev Rehab entered into a contract whereby Bev Rehab agreed to provide, and was compensated for providing, therapy services at BHR's facilities. This reorganization affected over 500 facilities, only 4 of which are at issue in this case. About 1000 therapy employees were terminated in conjunction with the reorganization. BEI and its subsidiaries incurred about \$2.5 million related to the termination of those employees. In a memorandum dated September 2, 1998 concerning this matter that was addressed to senior staff at BEI and other subsidiaries, Mathies and Wortley stated:

These materials are *not* an announcement affecting only [BHR]. This announcement affects our entire Company. The reorganization of [BHR] is an important part of our company-wide strategy.

....

Together as a company, we have many strengths that will see us through this time of change.

....

We know you will join us all in this united effort to make our Company even more successful as we seek to fulfill Beverly's Vision 2000+; "To be the most respected, successful and desired provider of healthcare services in the communities that we serve."

As will be seen in ore detail below, consequences of this transfer as they pertained to rehabilitation aides resulted in the events that lead to the 8(a)(5) allegations at issue in this case. This was so because BHR took the position that the rehabilitation aides that were transferred to Bev Rehab were no longer part of the existing service and maintenance units. BHR refused to recognize the Unions as the collective-bargaining representative of those employees and refused to apply the collective-bargaining agreements to them.

#### 4. Spectra

As indicated above, Spectra provided rehabilitation consultative services to BHR. Spectra also provided clinical services including developing clinical protocols, best practices, and education to BHR employees. Spectra also provided BHR with recruiting services whereby it assisted BHR in recruiting certain employees. Spectra had three subsidiaries, Bev Rehab, Homecare, and Matrix.

#### 5. Bev Rehab

Bev Rehab holds itself out as one of the largest contract rehabilitation companies in the nation, providing physical, speech, and occupational therapy to residents of more than 600 skilled nursing centers. As previously indicated, sometime before 1999 a decision was made to create Bev Rehab to provide therapy services for BHR. Cindy Susienka, who was to

become Bev Rehab's president, began in 1998 to work on making Bev Rehab operational. During that time she and others were carried on Spectra's payroll. Bev Rehab became operational January 1, 1999. Besides providing rehabilitation services to BHR, Bev Rehab also offered its services to non-Beverly businesses; this accounted for about 5 percent of its business in 1999 and had grown to about 30 percent of its business at the time of the hearing in this case.<sup>2</sup> A number of employees who had worked for Spectra became employees of Bev Rehab. About 90 percent of Bev Rehab employees came from some BEI company. More specifically, about 90 percent of the rehabilitation aides came from BHR.

Because Bev Rehab's employees were mobile it did not have field offices; its only office was in Fort Smith. Shortly after the change Bev Rehab conducted training of rehabilitation aides according to a training program that it had purchased from an outside vendor. This program focused on competency and hands-on training such as how to assist patients with ambulation, range of motion, and the like. As indicated, Bev Rehab provided the bulk of its rehabilitation services for BHR. In addition, at times BHR had a need for direct care staff that it was unable to fill. A Bev Rehab employee would be assigned to perform that work. The employee who performed the work would be paid by Bev Rehab and it would transfer those costs to BHR's ledger. On occasions Bev Rehab lacked the staff to provide services to its customers. In those circumstances it decides whether to subcontract that work to other businesses.

Before the transfer BHR and Spectra cooperated to develop and implement protocols for the reduction in force and for reducing and adjusting salaries. The benefit package that was offered to the transferred employees was first submitted for review to several individuals, including some from BEI's legal department. Consultants employed by Spectra made the final decision as to which BHR employees were going to be retained by Bev Rehab. The employees retained by Bev Rehab did not have to reapply for employment; instead they were merely transferred to Bev Rehab. This meant that those employees did not have a disruption in their medical benefits or a loss of seniority. However, some employees other than rehabilitation aides did experience a reduction in pay. The reductions were based on a wage survey done by Spectra with help from BEI's compensation department. The rehabilitation aides at issue in this proceeding, however, did not experience a reduction in pay or benefits.

Bev Rehab developed its own human resources policy and procedures manual, but it used BHR's manual as a template for creating its own. Bev Rehab's manual was also reviewed by BEI's legal department. Bev Rehab also developed its own associate's handbook. As indicated above, both the manual and handbook were substantially similar to those of the other subsidiaries. Bev Rehab developed its affirmative action plan through BEI, who had contracted with an outside consultant to provide these services. Bev Rehab personnel attended the pro-

active union management seminar described above and they later shared some of the information from the seminar with other managers in Bev Rehab.

Bev Rehab operated under the same capital appropriations approval process described above, but it had very little capital. Bev Rehab created its own budgets but its budgets were reviewed and approved by BEI. The travel policy described above also applied to Bev Rehab. As with the other subsidiaries, Bev Rehab had its own payroll department but BEI actually produced the paychecks, the W-2 forms, credit union deductions and the like. Bev Rehab's tax returns were prepared by BEI. Bev Rehab's insurance was obtained through BEI's risk management department. That department selected the insurance carriers and the amount of insurance coverage. Workers' compensation claims filed by Bev Rehab employees were processed by BEI's risk management department. BEI's code of conduct and business ethics was applicable to the employees of Bev Rehab. Lawsuits brought against Bev Rehab were handled by BEI's legal department. Openings for positions with Bev Rehab were posted on BEI's website. Bev Rehab availed itself of other aspects of the wide range of services that BEI provided to its subsidiaries. But Bev Rehab created its own quality management system and had no interaction with BEI's quality management. Nor did it interact with BEI's human resources department because it created its own human resources department.

Susienka, Bev Rehab's president, was in frequent contact with Mark Worthley, Spectra's president, by telephone, email, and in person. Susienka and Worthley discussed matters such as where Bev Rehab was in terms of its creation, the development of plans for Bev Rehab once it was created, and how Bev Rehab was performing as measured against those plans. Susienka also made periodic progress reports to the highest executives of BEI.

#### 6. Homecare

Homecare provided both hospice and homecare services. Homecare's hospice program dealt with patients who were terminally ill. It described its service as "a comprehensive, medically directed, team-oriented program of care that emphasizes pain control and symptom management rather than curative treatment." This service was provided to patients in hospitals, nursing homes, hospices, and in their homes. Under the homecare program a healthcare provider visited the patient's home and administered drugs or medication. Medications or fluid could be administered through use of an IV device, for example. Homecare also provided durable medical equipment such as hospital beds and bedside commodes to patients for home use. During the relevant time period it employed about 4000 employees in classifications such as registered nurse, licensed practical nurse, home healthcare aides, therapists, and sitter companions.

As indicated above, Homecare is a wholly owned subsidiary of Spectra. Glen Cavallo was Homecare's president and chief operating officer during the relevant time period. Homecare in turn, had three wholly owned subsidiaries: A-1 Home Healthcare, Inc., HTHC Holdings, Inc., and Hospice Preferred Choice, Inc. Cavallo was president of each of these corporations.

<sup>2</sup> Before the transfer BHR also provided rehabilitation services to non-BEI businesses. This accounted for less than 5 percent of BHR's business. This work was mainly done by therapists and not rehabilitation aides.

Homecare's capital expenditures were approved in accordance with the procedures previously described. In February 1999, Homecare decided to temporarily step out of the intermittent home health business. Cavallo made that recommendation to his superior, Mark Wortley, at Spectra. After Wortley's approval the matter was presented to BEI for its approval. Likewise, Homecare's annual budget goes through the same process. Homecare took advantage of some of the services offered to it by BEI, such as insurance purchases, tax preparation, litigation of claims, and processing workers' compensation claims. Homecare employees and managers interacted with BEI managers in areas such as sales and marketing, strategic planning, and acquisitions. Homecare also had a contractual relationship with Bev Rehab where Bev Rehab would provide its therapists for Homecare's patients. The extent to which this service was actually used is unclear in the record.

Homecare had its own human relations department and determined the pay and benefits that its employees would receive. However, in general, those employees received the same pay and benefits offered to the employees of all the other subsidiaries of BEI. Homecare's employees were covered by the travel policy described above.

Homecare and BHR worked together to grow the hospice business. Homecare already provided hospice care in a number of communities and BHR used this service in its skilled nursing homes to care for terminally ill patients.

#### 7. Matrix

Matrix provided outpatient therapy services. Most of these services were provided in its approximately 170 clinics, but when Matrix acquired businesses that were providing such services at long-term facilities or hospitals, Matrix continued providing its services there. However, Matrix did not provide its services to any of the BHR nursing homes. It employed about 1700 nonmanagerial employees in classifications such as physical therapist, staff occupational therapist, technician, office coordinator, receptionist, accounting clerk, and payroll clerk. During the relevant time period Craig Rettke was Matrix's president. Matrix, in turn, wholly owned a number of subsidiaries. Rettke was president of those subsidiaries as well. The subsidiaries also shared common officers and management with Matrix. Rettke reported to Wortley of Spectra and regarded Wortley as his superior.

Matrix often used outside counsel to do its legal work. BEI's legal department would then only review that work. But BEI handled any lawsuits brought against Matrix. Matrix also handled its own renovation and modification to its existing structure instead of using BEI's construction department. This was because the scope of its renovations was typically extremely small. BEI's capital appropriation procedures, however, did apply to Matrix. Matrix developed its own budget that was then approved by Wortley in Spectra and then ultimately approved by senior management in BEI. BEI's travel policy likewise applied to Matrix. Matrix had its own information technology department that purchased Matrix's computer software, but it used BEI's services to purchase its computer hardware. Unlike some of the other subsidiaries, Matrix did its own Medicare billing. BEI's finance department prepared Ma-

trix's tax returns and its insurance coverage was obtained through BEI's risk management department. Matrix used BEI's services in conducting wage surveys to develop Matrix pay scale. Matrix consulted with BEI in preparing its monthly profit and loss forecasts, in procuring capital, and issuing press releases. Rattke of course attended the periodic meetings of senior management of BEI and its subsidiaries. Matrix had some generally limited interaction with others in BEI's hierarchy.

#### *B. Refusal-to-Bargain Issue*

Turning now to the specific work performed by the employees at issue in this case, the job description for rehabilitation aide under BHR indicated that these employees performed routine therapy as directed by a licensed therapist. The essential job functions were to transport patients to and from a treatment area, prepare the patients for treatment, assist with the treatment under the direct supervision of the therapist, assist in maintaining the cleanliness of the treatment area and maintaining an adequate stock of supplies and equipment, participate in meetings, perform assigned clerical work, provide community based services, and perform other duties as assigned. As the job descriptions of BHR and then Bev Rehab indicated, the essential functions of the rehabilitation aides remained the same after the change as before. However, before the change the rehabilitation aides worked at one facility. After the change a number of the aides regularly worked at more than one facility.

Suwannee Healthcare Center and Paradise Pines were owned by Beverly Enterprise Florida, Inc., a wholly owned subsidiary of BHR. The United Food and Commercial Workers Union, Local 1625 represented the service and maintenance employees at those facilities in separate bargaining units with individual contracts. The rehabilitation aides at issue in this case were included in their respective collective-bargaining unit and were covered by their respective collective-bargaining agreement. On January 1, 1999, as part of the transfer described above, Bev Rehab began providing rehabilitation services to the Suwannee facility as part of a cluster of four facilities located in Florida and one in Georgia. As of January 1, 1999, Bev Rehab also provided rehabilitation services to the Paradise Pines facility as part of a cluster of four Beverly facilities and three non-Beverly facilities. In about February 2000 and about December 2001, respectively, those facilities were sold to non-Beverly businesses. BHR also owned the Elizabeth Adam Crump and Northwest facilities. The United Food and Commercial Workers Union, Local 400 represented the service and maintenance employees at those facilities in bargaining units with individual contracts. As of January 1, 1999, Bev Rehab provided the rehabilitation services to the Crump facility as part of a cluster of five Beverly and one non-Beverly facilities. As of the same date those services were provided to Northwest facility as part of a cluster with two other facilities.

Martha Gail Stegall began working at the Suwannee facility in 1994. In 1996 she became a physical therapy technician/clerical. Immediately prior to January 1, 1999, James Waters, Frankie Marie Warner, and Tess Hankerson were also employed in that classification at the Suwannee facility. After the change to Bev Rehab only Stegall, Waters, and Warner

continued to be employed as physical therapy aides. Phyllis Bailey was director of the rehabilitation department there both before and after the change. After the change, however, Suzanne Zea became district manager and the employees submitted their time records and vacation requests to her for approval. Zea visited the facility only a few times a month for a couple hours each visit. Thus, Zea was not involved in the day-to-day direction of the rehabilitation aides. Instead, the aides worked under the direction of a physical therapist and Bailey.

The technicians worked in three rooms: speech therapy, occupational therapy, and physical therapy. At the request of the therapist, the technicians would transport the patient, sometimes by wheelchair, to the therapy room. The technicians also prepared the patients for the therapy by, for example, helping them on a table or parallel bars, or assembling the required weights for weight training exercises. Once the patient actually began the therapy routines under the guidance of the therapist, the technicians remained to observe the patient to be certain that the routines were being properly performed and to be present if the patient needed assistance. They would also, for example, place a hot or cold pack on the patient as directed by the therapist. They assisted the therapist in treating residents who had developed bedsores. All these duties remained the same after the transfer. After the change, however, the technicians performed more hands on therapy while the therapist was present in the room. The number of patients that the therapists worked with at any one time also increased. About a month after the transition a new policy and procedures manual was made available to the technicians and other Bev Rehab employees. After the change BHR no longer played a part in the supervision of Bev Rehab's employees.

Before the change Stegall ordered supplies about once a month. After the change she continued to order supplies but did so every second month. Also, because of strict budgetary limitations, she ordered fewer supplies. Stegall also performed some paperwork, describing those duties as:

I was responsible for the daily documentation that the therapists would write. I would file that. The daily logs. I would keep up with those, and make sure that the totals were correct. And at the end of the month, I would have to total everything up and make sure it came out correctly, and then submit it.

After the change:

The only difference when we were [Bev Rehab] we had computers, and the therapists would put certain numbers that I was keeping up with [BHR]. They were putting that into the computer, so it cut out just a little bit of the paperwork but not much.

As indicated above, after the change employees were assigned to work in clusters of facilities, but because the closest facility in the Suwannee facility was far away, Stegall continued to work only at that facility. Before the transition Stegall worked 40 hours per week. Immediately after the change she worked 10 hours per week, but later Stegall's hours increased to 30. Stegall kept the vacation hours that she had accumulated under BHR, but because she was a part-time employee under Bev Rehab she did not earn additional vacation time. The rehabili-

tation aides at Suwannee received no new training concerning any change in their duties as part of the transition from BHR to Bev Rehab. Stegall testified that her duties did not change concerning how she worked with the patients.<sup>3</sup>

Warner worked at the Suwannee facility since 1990. In 1998, she worked as a therapy aide. Before the transition she worked 40 hours per week. The first week after the change she worked 10 hours and thereafter received no hours. She then transferred back to BHR to work as a certified nursing assistant in the collective-bargaining unit because she no longer received assignments as a therapy technician. She too continued to work only at the Suwannee facility after the change.

Waters worked at the Suwannee facility since 1983. After working in several positions he became a rehabilitation aide. He too worked only at the Suwannee facility immediately before and after the change. The first week after the change Warner's hours were reduced to 12-15. In the following weeks his hours were reduced even further and he then too transferred back to BHR and returned to the bargaining unit.

Vernell Young began working at the Paradise Pines facility in 1995. He became a rehabilitation aide and he generally worked 40 hours per week at that facility. After the change his wage rate and benefits remained the same as before. Both before and after the change he worked only at the Paradise Pines facility. Both before and after the change his team leader was Fran Crawford. However, after the change Carly Gurski also became a supervisor who visited the facility once or twice a week. Young was also responsible for ordering supplies both before and after the change. The only difference was that before the change he wrote the information on paper whereas afterwards he entered the information on a computer. His other paperwork responsibilities did not change.

Deborah Hughes was a business agent for Local 1625; she serviced both the Suwannee and Paradise Pines facilities. In October or November 1998, she heard rumors from the employees that there was going to be a change. She contacted Wade Lemon, a regional director for BEI, and told him that it was the Union's position that the employees remained in the unit. Lemon said that it was the Company's position that it was a new employer. She finally met with Lemon in January 1999. On that occasion she continued to maintain that the employees remained in the unit and were covered by the collective-bargaining agreement; Wade said that the Company was not going to change its position and that Bev Rehab was not going to bargain with the Union over that decision. Wade did say that he could help the employees get back into the unit as certified nursing assistants. Hughes and Lemon met again on January 13; others were also present this time. Both parties adhered to

<sup>3</sup> Susienka, Bev Rehab's president, testified generally that prior to the change the duties of the rehabilitation aides were primarily administrative in nature in that they did the paperwork attendant to the therapy. She testified that after the transition to Bev Rehab the aides performed more hands-on patient care work in conjunction with the therapist. After the change, according to Susienka, Bev Rehab relied on the therapist to do the paperwork or it became the responsibility of the facility that received the service. I conclude that the more specific testimony of the employees who actually worked at the facilities is more reliable than Susienka's general testimony.

their positions. At no time did the Union consent to the removal of the rehabilitation aides from the unit. Although BHR was willing to discuss the effects of the transfer on unit employees, it was not willing to bargain about the decision to transfer the unit employees from BHR to Bev Rehab.

Grace Oriowo worked at the Northwest facility beginning in 1986. In 1995, she became a rehabilitation aide and worked in that position until September 2000 when she began working in the billing office. Before the change there were about six rehabilitation aides working for BHR at the facility; afterwards there were only four working for Bev Rehab. Before the change these employees worked 40 hours per week. After the transition Oriowo started working about 6 hours per day and then gradually went back to 40 hours per week. The duties of the rehabilitation aides at this facility were similar to those described above, and those duties did not significantly change after the transition to Bev Rehab. The exception was that before the change they generally worked with one patient at a time whereas afterwards they worked with several patients at the same time. Before the change Oriowo worked exclusively at the Northwest facility. Afterwards she worked at other non-Beverly facilities once or twice every week or two. The record is not clear, however, exactly when this started. The other rehabilitation aides who were retained there worked only at the Northwest facility.

No one who worked at the Crump Manor testified at the hearing. Respondent asserts that no rehab aides have worked at the Crump Manor facility since January 1, 1999. However, there is evidence that after the change an employee switched from working as a certified nursing assistant to work as a rehabilitation aide.

As with the Florida units, Respondent was willing to bargain over the effects of the transfer of the rehabilitation aides. However, Respondent was unwilling to bargain over the decision and Local 400 never expressed its consent to the removal of the rehabilitation aides from the unit. Local 400, like Local 1625, dealt with Waters from BEI on these matters.

Respondent asserts that the Paradise Pines facility was sold in December 2001 to Seacrest. The parties stipulated that the Suwannee facility was sold in early 2000 to Delta Health Group, a non-Beverly enterprise. Respondent asserts that at the Northwest facility the therapy aides were rehired and BHR has recognized the Union as their representative again.

### III. ANALYSIS

#### A. Single Employer Issue

The Board examines four main factors in determining whether separate businesses nonetheless constitute a single employer: (1) common ownership or financial control; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations. *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Services of Mobile*, 380 U.S. 255 (1965); *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902 (9th Cir. 1964), enfg. 137 NLRB 1220 (1962). The determination of single employer status is made on a case-by-case basis. *Blumenfield Theaters Circuit*, 206 NLRB 206 (1979), enfd. 625 F.2d 865 (9th Cir.

1980). Although Respondent denies that it is a single employer, it admits in its answer that it has:

common officers, ownership, and directors; have shared some common premises and facilities, have provided some services for each other; and have held themselves out to the public as related business enterprises.

Also, in its brief Respondent admits that BEI has financial oversight of BHR and Spectra and their respective subsidiaries through common directors and its status as the majority shareholder of each subsidiary. Respondent also describes how this financial oversight allows BEI to develop a consolidated performance plan that tracks the allocation of resources among, and the profitability of, the subsidiaries. The facts set forth above fully support these admissions. There is no doubt that Respondent meets the first three factors of the single-employer test, and I so conclude.

A more detailed analysis is required in deciding whether Respondent has centralized control of labor relations. The Board has held that this factor is particularly significant in deciding single-employer status. *Parklane Hosiery Co.*, 203 NLRB 597(1973).

The Board has also pointed out that the mere potential for control of labor relations brought about by common ownership is not a factor accorded weight in case such as this where parent and subsidiary businesses are involved. *Western Union Corp.*, 224 NLRB 274 (1976). Rather, it is the actual or active control over the day-to-day operations or labor relations that is significant. *Dow Chemical Co.*, 326 NLRB 288 (1998).

As noted above, BHR, Bev Rehab, Matrix, and Homecare each had their own policies and procedures manual. These manuals covered the full range of employment matters such as codes of conduct, benefits, pay, and safety and health. Although each subsidiary had its own manual, the more important fact is that all the manuals were substantially similar. Respondent argues that each subsidiary had the right to select or reject any of the benefits offered by BEI. But I conclude this right was more theoretical than real. It is more aptly described as no more than the ability to make some small variances from subsidiary to subsidiary while still remaining consistent with BEI's overall approach to employment matters. The commonality of the provisions in the policies and procedures manuals is compelling evidence of centralized control of labor relations.

The sections of the policies and procedures manuals pertaining to union-related matters are particularly revealing. Each manual gave similar instructions and guidance concerning how union organizing efforts were to be handled. They each indicated that certain matters, such as requests for information and contract negotiations, would be handled with assistance from BEI's labor and employment department and/or BEI's legal department. In fact, BEI's labor and employment department was headed by Donald Dotson, who reported directly to BEI's chief operating officer. Reporting directly to Dotson were four regional directors who each had responsibility for a particular geographic area of the country. One of those regional directors, Wade Lemon, handled the discussions with the Unions that emanated from the transfer of the rehabilitation aides from BHR to Bev Rehab.

Likewise BHR, Bev Rehab, Matrix, and Homecare each had their own employee handbook. But here too the handbooks contained no significant differences. This fact also supports a conclusion of centralized control of labor relations.

Certain other employment policies were created by BEI who then required that all its employees, including those in BHR, Bev Rehab, Matrix, and Homecare, abide by them. Examples are the code of conduct and business ethics and the drug testing and background investigation guidebook.

Also significant in determining whether there was centralized control of labor relations is the fact that Bev Rehab did not decide which of the BHR employees to retain. Instead, Spectra made the decision as to how those employees were to be selected.

Based on the foregoing and on the record as a whole, I conclude that there is sufficient evidence to support the finding that BEI, BHR, Spectra, Bev Rehab, Matrix, and Homecare share centralized control of labor relations. Together with the findings above that these business entities shared common ownership, common management, and functional interrelation of operations; I further conclude that they constitute a single employer and a single-integrated enterprise.

#### B. Refusal to Bargain Issue

It is well settled that an employer may not alter the scope of a bargaining unit without the consent of the union representing the employees. *Boise Cascade Corp.*, 283 NLRB 462 (1987). Likewise, an employer may not transfer employees out of the unit and then fail to recognize a union as the collective-bargaining representative of the transferred employees where the transferred employees performed essentially the same work after the transfer as before. *Illinois-American Water Co.*, 296 NLRB 715 (1989), *enfd.* 933 F.2d 1368 (7th Cir. 1991).

Thus, the factual matter that must be resolved is whether the rehabilitation aides performed essentially the same work before as after the transfer so that they remained part of the collective-bargaining unit. *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982), *enfd.* 721 F.2d 187 (7th Cir. 1983). The facts described more fully above show that the rehabilitation aides at issue in this case continued to perform the same functions after the transfer as before. They continued to transport patients to and from a treatment area, prepared the patients for treatment, assisted with the treatment under the direct supervision of the therapist, assisted in maintaining the cleanliness of the treatment area and maintaining an adequate stock of supplies and equipment, and performed assigned clerical work. Although some rehabilitation aides had their hours of work reduced, they retained their seniority, pay rate, and benefits. Moreover, the ease with which some rehabilitation aides transferred back into other unit positions after first working for Bev Rehab also shows that the unit remained intact.

Respondent contends that after the transition from BHR to Bev Rehab the duties of the rehabilitation aides changed to such an extent that they were no longer part of the existing collective-bargaining unit. However, the fact that after the change they worked with more than one patient at a time does little to alter the fundamental nature of the work they performed. Of course, at least one rehabilitation aide from the four

facilities worked at facilities other than at a union represented facility and rehabilitation aides from other facilities occasionally worked at the union represented facilities. These facts go to the question of whether the single-facility units remained appropriate, but they alone are insufficient to rebut the presumption that single facility units are appropriate for purposes of collective bargaining. This is especially the case here where there is a history of collective bargaining on the single-facility basis.<sup>4</sup>

Respondent points to apparently more extensive changes that occurred at other facilities after the transfer. However, the issue before me is only whether the rehabilitation aides at the Suwannee, Paradise Pines, Northwest, and Crump Manor facilities remained part of the existing bargaining unit. I need not decide whether single-facility units are appropriate at other locations. I therefore conclude that the rehabilitation aides at the four facilities at issue remained part of the collective bargaining units even after the transfer.

Respondent argues that the management-rights clause in the collective-bargaining agreements clearly and unmistakably waived whatever rights the Unions had to bargain over the matter. More specifically, Respondent argues that the broad management-rights clause amounted to consent by the Unions to "allow BHR and the nursing homes to make the changes that were made in the rehabilitation aide job duties, responsibilities, reporting structure and work location." For purposes of this decision I shall assume that this is correct. However, Respondent goes on to argue: "This included giving BHR and the nursing homes the unilateral right to make changes that had the effect of pulling the rehabilitation aides outside the scope of the bargaining unit." I disagree because I have concluded above that the changes were insufficient to have the effect of removing those employees from the existing bargaining units. Because withdrawal of recognition for a portion of the unit requires the consent of the Unions, and because the management rights provision did not grant such consent, I reject Respondent's argument.

Respondent argues that the analysis set forth in *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982), is inappropriate, citing *Hill-Rom Co.*, 957 F.2d 454 (7th Cir. 1992), and *University of Chicago v. NLRB*, 514 F.2d 942 (7th Cir. 1985). Of course, I am bound to apply Board law.

Finally, Respondent argues that under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), BHR was privileged to go out of the business of providing rehabilitation services. That argument is unpersuasive because Respondent did not go out of the business of providing those services. Instead, it merely transferred those operations from one part of its business to another.

I therefore conclude that by refusing to recognize the Unions as the collective-bargaining representative for the rehabilitation aides as part of the established collective-bargaining units at that Paradise Pines, Suwannee, Northwest, and Crump Manor

<sup>4</sup> The unit placement of employees from other facilities who work at the union represented facilities can be determined in the compliance portion of these proceedings applying traditional representation case law.

facilities and by refusing to apply the collective-bargaining agreements to the rehabilitation aides, Respondent violated Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By refusing to recognize the Unions as the collective-bargaining representative for the rehabilitation aides as part of the established collective-bargaining units at that Paradise Pines, Suwannee, Northwest, and Crump Manor facilities and by refusing to apply the collective-bargaining agreements to the rehabilitation aides, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I have concluded that Respondent unlawfully failed and refused to recognize the Unions as the collective-bargaining representative for the rehabilitation aides as part of the established collective-bargaining units at the Paradise Pines, Suwannee, Northwest, and Crump Manor facilities. I shall require that Respondent extend such recognition. Issues concerning whether those units still exist shall be resolved in the compliance proceedings. I have concluded that Respondent failed and refused to apply the collective-bargaining agreement to the rehabilitation aides. I shall require that Respondent do so. I shall also require that Respondent make those employees whole for loss of earnings and other benefits as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The General Counsel raises the possibility that Respondent's unfair labor practices may have caused some employees to quit their positions as rehabilitation aides. That issue too is appropriate for resolution in the compliance stage of these proceedings. As to any such employees, Respondent must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, supra. Although in the complaint the General Counsel requested a number of extraordinary remedies, in his brief he now seeks the entry of an order against Respondent as a single employer. The General Counsel also seeks a nationwide posting. I agree that an order against Respondent as a single employer is appropriate. Indeed, such an order would be a normal remedy. Supporting that conclusion is the fact that BEI, BHR, and Spectra played direct roles in the transfers that lead to the unfair labor practices in this case. However, I disagree with the General Counsel's request for a nationwide posting. The unfair labor practices occurred only at the four facilities involved in this case. There is no evidence that employees at other facilities were aware of these unfair labor practices or that the normal notice posting requirements will be inadequate. I shall therefore require that

the notices be posted only at the four facilities involved in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondent, Beverly Enterprises, Inc., Fort Smith, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize the United Food and Commercial Workers International Union, Local 1625, AFL-CIO as the collective-bargaining representative for the rehabilitation aides as part of the established collective-bargaining units at the Paradise Pines and Suwannee facilities and refusing to apply the collective-bargaining agreement to the rehabilitation aides, and refusing to recognize the United Food and Commercial Workers International Union, Local 400, AFL-CIO as the collective-bargaining representative for the rehabilitation aides as part of the established collective-bargaining units at the Northwest and Crump Manor facilities and refusing to apply the collective-bargaining agreements to the rehabilitation aides.

(b) Refusing to recognize the United Food and Commercial Workers International Union, Local 400, AFL-CIO as the collective-bargaining representative for the rehabilitation aides as part of the established collective-bargaining units at the Northwest and Crump Manor facilities and refuse to apply the collective-bargaining agreements to the rehabilitation aides.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain with the United Food and Commercial Workers International Union, Local 1625, AFL-CIO as the exclusive representative of the rehabilitation aides employed at the Paradise Pines facility as part of the following appropriate unit concerning terms and conditions of employment:

All full-time and regular part-time non-professional associates in the bargaining unit located at Paradise Pines, 11565 Harts Road, Jacksonville, Florida 32218 (certified by the National Labor Relations Board, Case 12-RC-6408); said bargaining unit including all full-time and regular part-time service and maintenance associates, including cooks, dietary aides, nursing assistants, physical therapy assistants, janitors, laundry aides and housekeeping aides; excluding administrator, director of nursing, nursing supervisor, charge nurses, all registered nurses, all licensed practical nurses, activities director, social service director, maintenance supervisor, staff development coordinator, bookkeepers, administrative secretary/personnel specialist, all office clerical associates, medical records secre-

<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tary, licensed physical therapy assistants, professional associates, technical supervisors as defined in the Act.

(b) Recognize and bargain with the United Food and Commercial Workers International Union, Local 1625, AFL-CIO as the exclusive representative of the rehabilitation aides employed at the Suwannee facility as part of the following appropriate unit concerning terms and conditions of employment:

All full-time and regular part-time non-professional associates in the bargaining unit located at Suwannee Health Care Center, 1620 Helvenston Street SE, Live Oak, Florida 32060 (certified by the National Labor Relations Board, Case 12-RC-6760; said bargaining unit including all full-time and Regular part-time service and maintenance associates, including cooks, dietary aides, nursing assistants, physical therapy assistants, janitors, Laundry aides and housekeeping aides; excluding administrator, director, maintenance supervisor, staff development coordinator, bookkeepers, administrative secretary/personnel specialist, all office clerical associates, medical records secretary, licensed physical therapy assistants, professional associates technical supervisors as defined in the Act.

(c) Recognize and bargain with the United Food and Commercial Workers International Union, Local 400, AFL-CIO as the exclusive representative of the rehabilitation aides employed at the Northwest facility as part of the following appropriate unit concerning terms and conditions of employment:

Included all full-time and regular part-time service and maintenance employees employed by the Employer at 3333 Wisconsin Avenue, N.W., Washington, D.C. including nurses' assistants, ward clerks, activities employees, dietary and kitchen employees, maintenance employees, housekeeping and laundry employees, and painters, excluding registered nurses, licensed practical nurses, office clericals, professionals, technical employees, guards and supervisors as defined in the Act, and all other employees.

(d) Recognize and bargain with the United Food and Commercial Workers International Union, Local 400, AFL-CIO as the exclusive representative of the rehabilitation aides employed at the Crump Manor facility as part of the following appropriate unit concerning terms and conditions of employment:

All regularly scheduled non-professional employees in the bargaining unit certified by the National Labor Relations Board in Case 5-RC-12097; said bargaining unit including all full time and regular part-time service and maintenance employees, including nursing assistants, physical therapy aides, food service employees, including, cooks, housekeeping employees, maintenance employees, activities assistant, beauty shop operator, and laundry employees at the Employer's facility located in Glen Allen, Virginia; said bargaining unit excluding office clerical employees, administrative secretary, medical records clerk/nursing secretary, administrator, director of nursing, registered nurses, licensed practical nurses, executive housekeeper, floor supervisor, foods service director, bookkeeper, activities director, dietary supervisors, physical therapist, maintenance engineer, social services director, social worker, education coordinator, director of volun-

teer services, confidential employees, temporary and casual employees, guards and supervisors as defined in the Act.

(e) Make employees whole for any loss of earnings and other benefits suffered as a result of the unfair labor practices, in the manner set forth in the remedy section of the decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Paradise Pines, Suwannee, Northwest, and Crump Manor facilities copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at those facilities at any time since January 1, 1999.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 17, 2003

#### APPENDIX

##### NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

<sup>6</sup> If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted By Order of The National Labor Relations Board" Shall Read "Posted Pursuant To A Judgment of The United States Court Of Appeals Enforcing An Order of The National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize the United Food and Commercial Workers International Union, Local 1625, AFL-CIO as the collective-bargaining representative for the rehabilitation aides as part of the established collective-bargaining units at the Paradise Pines and Suwannee facilities and refuse to apply the collective-bargaining agreement to the rehabilitation aides.

WE WILL NOT refuse to recognize the United Food and Commercial Workers International Union, Local 400, AFL-CIO as the collective-bargaining representative for the rehabilitation aides as part of the established collective-bargaining units at the Northwest and Crump Manor facilities and refuse to apply the collective-bargaining agreements to the rehabilitation aides

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain with the United Food and Commercial Workers International Union, Local 1625, AFL-CIO as the exclusive representative of the rehabilitation aides employed at the Paradise Pines facility as part of the following appropriate unit concerning terms and conditions of employment:

All full-time and regular part-time non-professional associates in the bargaining unit located at Paradise Pines, 11565 Harts Road, Jacksonville, Florida 32218 (certified by the National Labor Relations Board, Case 12-RC-6408); said bargaining unit including all full-time and regular part-time service and maintenance associates, including cooks, dietary aides, nursing assistants, physical therapy assistants, janitors, laundry aides and housekeeping aides; excluding administrator, director of nursing, nursing supervisor, charge nurses, all registered nurses, all licensed practical nurses, activities director, social service director, maintenance supervisor, staff development coordinator, bookkeepers, administrative secretary/personnel specialist, all office clerical associates, medical records secretary, licensed physical therapy assistants, professional associates, technical supervisors as defined in the Act.

WE WILL recognize and bargain with the United Food and Commercial Workers International Union, Local 1625, AFL-CIO as the exclusive representative of the rehabilitation aides employed at the Suwannee facility as part of the following appropriate unit concerning terms and conditions of employment:

All full-time and regular part-time non-professional associates in the bargaining unit located at Suwannee Health Care Center, 1620 Helvenston Street SE, Live Oak, Florida 32060 (certified by the National Labor Relations Board, Case 12-RC-6760; said bargaining unit including all full-time and Regular part-time service and maintenance associates, including cooks, dietary aides, nursing assistants, physical therapy assistants, janitors, Laundry aides and housekeeping aides; excluding administrator, director, maintenance supervisor, staff development coordinator, bookkeepers, administrative secretary/personnel specialist, all office clerical associates, medical

records secretary, licensed physical therapy assistants, professional associates technical supervisors as defined in the Act.

WE WILL recognize and bargain with the United Food and Commercial Workers International Union, Local 400, AFL-CIO as the exclusive representative of the rehabilitation aides employed at the Northwest facility as part of the following appropriate unit concerning terms and conditions of employment:

Included all full-time and regular part-time service and maintenance employees employed by the Employer at 3333 Wisconsin Avenue, N.W., Washington, D.C. including nurses' assistants, ward clerks, activities employees, dietary and kitchen employees, maintenance employees, housekeeping and laundry employees, and painters, excluding registered nurses, licensed practical nurses, office clericals, professionals, technical employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL recognize and bargain with the United Food and Commercial Workers International Union, Local 400, AFL-CIO as the exclusive representative of the rehabilitation aides employed at the Crump Manor facility as part of the following appropriate unit concerning terms and conditions of employment:

All regularly scheduled non-professional employees in the bargaining unit certified by the National Labor Relations Board in Case 5-RC-12097; said bargaining unit including all full time and regular part-time service and maintenance employees, including nursing assistants, physical therapy aides, food service employees, including, cooks, housekeeping employees, maintenance employees, activities assistant, beauty shop operator, and laundry employees at the Employer's facility located in Glen Allen, Virginia; said bargaining unit excluding office clerical employees, administrative secretary, medical records clerk/nursing secretary, administrator, director of nursing, registered nurses, licensed practical nurses, executive housekeeper, floor supervisor, foods service director, bookkeeper, activities director, dietary supervisors, physical therapist, maintenance engineer, social services director, social worker, education coordinator, director of volunteer services, confidential employees, temporary and casual employees, guards and supervisors as defined in the Act.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of the unfair labor practices, in the manner set forth in the remedy section of this decision.

BEVERLY ENTERPRISES, INC.